



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

July 6, 2016

Via electronic mail
Mr. Jonah Newman
The Chicago Reporter
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Chicago, Illinois 60604
jnewman@chicagoreporter.com

Via electronic mail
Ms. Charise Valente
General Counsel
Chicago Police Department
3510 South Michigan Avenue
Chicago, Illinois 60653
pacola@chicagopolice.org

RE: FOIA Request for Review – 2016 PAC 41455

Dear Mr. Newman and Ms. Valente:

This determination is issued pursuant to section 9.5(f) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(f) (West 2014)). For the reasons discussed below, the Public Access Bureau concludes that the Chicago Police Department improperly withheld information responsive to Mr. Jonah Newman's FOIA request.

In a letter dated April 4, 2016, Mr. Newman, on behalf of *The Chicago Reporter*, submitted a FOIA request to CPD seeking a spreadsheet of certain categories of information from "the 'Arrest Processing Report' section" of arrest reports he received in response to a previous FOIA request.¹ On April 19, 2016, CPD provided responsive records consisting of lists of information pulled from some of the requested categories, but withheld all information under the categories "visual check of arrestee," "arrestee questionnaire," and "questionnaire remarks,"

¹Letter from Jonah Newman, Data and Investigative Reporter, *The Chicago Reporter*, to FOIA Officer, Chicago Police Department (April 4, 2016).

Mr. Jonah Newman
Ms. Charise Valente
July 6, 2016
Page 2

citing section 7(1)(a) of FOIA (5 ILCS 140/7(1)(a) (West 2015 Supp.)).² Section 7(1)(a) exempts from disclosure "[i]nformation specifically prohibited from disclosure by federal or State law or rules and regulations implementing federal or State law." CPD's response asserted that federal regulations (45 CFR Part 160, Part 162, Part 164) implementing the Health Insurance Portability and Accountability Act of 1996 (HIPAA) Pub. L. No. 104-191, 110 Stat. 1936 (1996)) prohibit CPD from releasing this information. Mr. Newman's Request for Review disputed the withholding of that information.

On April 25, 2016, this office sent a copy of the Request for Review to CPD and asked it to provide a representative sample of the records that were withheld for this office's confidential review, together with a detailed explanation for the assertion that HIPAA specifically prohibits CPD from disclosing the requested information. Having received no response, on May 27, 2016, this office again requested those materials. On June 9, 2016, CPD responded that although that the reasoning for not providing certain fields in the response to Mr. Newman's FOIA request "appears to be erroneous[.]" the response was still proper because the "visual check of arrestee," "arrestee questionnaire," and "questionnaire remarks" are contained in "freeform, variable length text fields that are not suitable for spreadsheet production. * * * This information is available in each individual arrest report, but unable to be captured in spreadsheet form."³ On June 10, 2016, Mr. Newman replied that all three fields appear to be the same as or similar to other fields that CPD had provided in the spreadsheet he received. He added that even if the information could not be provided in spreadsheet format, CPD is "obligated under the statute to provide them to me in some format. Therefore, CPD's response to your inquiry letter, even if taken as credible on its face, is not a valid reason to continue to withhold these records."⁴

DETERMINATION

"All records in the custody or possession of a public body are presumed to be open to inspection or copying. Any public body that asserts that a record is exempt from disclosure has the burden of proving by clear and convincing evidence that it is exempt." 5 ILCS 140/1.2 (West 2014). FOIA requires that "each public body shall make available to any person for inspection and copying all public records, except as otherwise provided in Section 7 of this Act." 5 ILCS 140/3(a) (West 2014).

²Letter from P.O. Zuniga, #10919, Freedom of Information Officer, Chicago Police Department, Office of Legal Affairs, to Jonah Newman, *Chicago Reporter* (April 19, 2016).

³Letter from Ryan Nelligan, Office of Legal Affairs, Department of Police, City of Chicago, to Office of the Attorney General, Steve Silverman, Assistant Bureau Chief (June 9, 2016).

⁴Letter from Jonah Newman, Data and Investigative Reporter, *The Chicago Reporter*, to Steve Silverman, Assistant Bureau Chief, Public Access Bureau, Office of the Attorney General (June 10, 2016).

Mr. Jonah Newman
Ms. Charise Valente
July 6, 2016
Page 3

As an initial matter, CPD's response to this office appears to acknowledge that its response to Mr. Newman's request improperly cited federal regulations implementing HIPAA as its basis for withholding the categories of information about arrestees that are at issue. We agree. HIPAA's privacy rule specifically prohibits a "covered entity" from releasing individually identifiable health information unless disclosure is permitted by HIPAA. 45 C.F.R. § 164.502(a). A "covered entity" is a health care provider, a healthcare clearinghouse, or a health plan. 45 C.F.R. § 160.10. In *People v. Bauer*, 402 Ill. App. 3d 1149, 1158 (5th Dist. 2010), the Illinois Appellate Court concluded that law enforcement agencies are not covered entities under HIPAA and therefore are not subject to HIPAA's privacy rule. Likewise, the Public Access Bureau has consistently determined that because police departments are not covered entities, HIPAA does not specifically prohibit police departments from disclosing records. *Accord* Ill. Att'y Gen. PAC Req. Rev. Ltr. 19519, issued October 12, 2012, at 3. Therefore, HIPAA does not provide a valid basis to withhold any of the information Mr. Newman sought in his FOIA request.

With respect to CPD's assertion that it is not required to provide the information at issue because it is "not suitable for spreadsheet production[.]" section 6(a) of FOIA (5 ILCS 140/6(a) (West 2014)) provides:

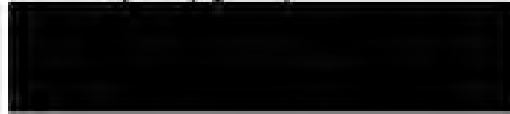
When a person requests a copy of a record maintained in an electronic format, the public body shall furnish it in the electronic format specified by the requester, if feasible. *If it is not feasible to furnish the public records in the specified electronic format, then the public body shall furnish it in the format in which it is maintained by the public body, or in paper format at the option of the requester.* (Emphasis added.)

It is undisputed that CPD maintains the requested information in electronic format. Therefore, if it is not feasible for CPD to provide the records in the spreadsheet format that Mr. Newman requested, section 6(a) of FOIA expressly requires CPD to give him the option of receiving the information in either the electronic format in which it is maintained or in paper format. CPD's response to Mr. Newman's FOIA request did not make those options available to him or assert that providing paper or electronic copies of the records would be unduly burdensome pursuant to section 3(g) of FOIA (5 ILCS 140/3(g) (West 2014)). Accordingly, CPD's response to the request violated FOIA. To remedy that violation, this office requests that CPD disclose the requested "visual check of arrestee," "arrestee questionnaire," and "questionnaire remarks" to Mr. Newman in his choice of either the electronic format in which the information is maintained or in paper format.

Mr. Jonah Newman
Ms. Charise Valente
July 6, 2016
Page 4

The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. If you have any questions, please contact me at (312) 814-6756. This letter serves to close this file.

Very truly yours,



STEVE SILVERMAN
Assistant Bureau Chief
Public Access Bureau

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